DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOSE R. VASQUEZ, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, WHITE MOUNTAIN NISSAN, Respondent Employer, TRANS CITY CASUALTY INS., Respondent Carrier.	No. 1 CA-IC 10-0038 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20080-520066

Carrier Claim No. TL 08005

Administrative Law Judge J. Matthew Powell

AWARD AFFIRMED

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D O W N I E, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for scheduled disability benefits. Petitioner employee Jose Vasquez ("Claimant") argues the administrative law judge ("ALJ") should have found that a pre-existing non-industrial injury gave rise to an earning capacity disability. We disagree and thus affirm.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in the light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 On February 7, 2008, Claimant was employed by the respondent employer, White Mountain Nissan, as a detail manager, overseeing and performing automobile detail work. While performing

his job duties that day, Claimant slipped on ice and fell, breaking his right ankle. He filed a workers' compensation claim that was accepted for benefits. Claimant had surgery on his ankle, and his claim was eventually closed with a scheduled fifteen percent impairment of the right lower extremity. Claimant timely protested the closure and argued his claim should have been closed with an unscheduled impairment.

¶4 Two hearings were held to consider testimony from Claimant and his labor market expert, Richard Prestwood. Claimant testified that, at the time of the industrial injury, he had a pre-existing neck injury that he sustained at his 1993 wedding. During the tossing of the groom,[1] he was dropped and landed on his head. Claimant underwent a C6-7 fusion and laminectomy.

¶5 At the time of his neck injury, Claimant was employed as an agricultural laborer, packing 50 and 100 pound bags of potatoes. Following cervical surgery, Claimant could not return to heavy labor and was re-trained by the Idaho Department of Vocational Rehabilitation as a truck driver. Claimant worked as an agricultural truck driver until he voluntarily relocated to Show Low, Arizona. Claimant maintains a license to drive type B trucks[2] with no restrictions, despite residual weakness in both hands from the neck injury. Claimant testified he was paid the same amount or

[1] Claimant explained that this is a Mexican wedding tradition.

[2] Type B trucks were described as "dump trucks, buses, small trucks but not large rigs."

more as an agricultural truck driver, as compared to his wages as an agricultural laborer. At the time of his industrial injury, Claimant was earning $12.25 per hour as a detail manager--roughly double his wages as a truck driver.

¶6 It was Prestwood's opinion that Claimant had an earning capacity disability at the time of his industrial injury. The basis for his opinion was that Claimant was off work for two years following his neck injury and had to be retrained for a new position.

¶7 The ALJ entered an award for scheduled disability benefits. With regard to scheduling, the ALJ stated:

> 8. It is concluded that applicant did not have an earning capacity disability resulting from his 1993 accident that would unschedule the otherwise scheduled permanent impairment he sustained as a result of the 2008 industrial injury. While applicant can (and does) argue that the 1993 accident had at least a temporary effect on his earning capacity, the historical evidence overwhelmingly establishes that it had no permanent effect on his earning capacity and was in no away affecting his earning capacity at the time he sustained his industrial injury in 2008. Accordingly, it is concluded that the carrier correctly closed applicant's claim with a 15% scheduled permanent impairment to the right lower extremity effective April 10, 2009. Applicant has received the benefits to which he was entitled for that permanent impairment under A.R.S. § 23-1044(B).

Claimant timely requested administrative review, but the ALJ summarily affirmed his award. Claimant next brought this appeal.

III. DISCUSSION

¶8 Arizona courts have long recognized that when a claimant has multiple impairments, those impairments may result in a greater total disability than the sum of the individual disabilities. *See Ossic v. Verde Cent. Mines,* 46 Ariz. 176, 188, 49 P.2d 396, 401 (1935); 5 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 90.01 (2010). Arizona Revised Statutes § 23-1044(E) addresses when an otherwise scheduled injury will be unscheduled. It states:

> In case there is a previous disability, as the loss of one eye, one hand, one foot or otherwise, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

¶9 The Arizona Supreme Court has interpreted § 23-1044(E) to require that a scheduled injury be unscheduled if, at the time of the subsequent scheduled industrial injury, the claimant suffered from an earning capacity disability. *See, e.g.*, *Fremont Indem. Co. v. Indus. Comm'n,* 144 Ariz. 339, 342, 697 P.2d 1089, 1092 (1985) (claimant must "prove at the time of the second injury a loss of earning capacity as a result of the prior disability"). In *Alsbrooks v. Industrial Commission*, 118 Ariz. 480, 483, 578 P.2d 159, 162 (1978), the court stated:

> We do not believe that any physical impairment, the result of a prior non-industrial accident, is a "previous

> disability" for the purposes of Paragraph E unless there is some evidence, no matter how slight, that it is also an earning capacity disability. To hold that after a non-industrial injury, any physical impairment will convert a second scheduled injury into an unscheduled injury, would, in effect, do completely away with all scheduled injury awards since it is a rare person indeed who does not have some previous physical impairment as a result of some prior injury.

¶10 Claimant is entitled to neither a conclusive nor rebuttable presumption of earning capacity disability. A conclusive presumption would attach if he had experienced a prior scheduled industrial injury. *See Borsh v. Indus. Comm'n*, 127 Ariz. 303, 305, 620 P.2d 218, 220 (1980). The 1993 injury, though, was not industrially-related. And because the 1993 injury would have been unscheduled had it occurred in the industrial context, *see* A.R.S. § 23-1044(C); *e.g.*, *Hoffman v. Brophy*, 61 Ariz. 307, 310-11, 149 P.2d 160, 161 (1944), there is no rebuttable presumption of earning capacity disability. *Borsh*, 127 Ariz. at 305, 620 P.2d at 220.

¶11 "[A] subsequent scheduled disability may, nevertheless, be converted if the claimant proves an *actual* loss of earning capacity at the time of the second injury as a result of the prior injury." *Fremont,* 144 Ariz. at 342, 697 P.2d at 1092. The record supports the determination that Claimant failed to prove an earning capacity disability at the time of his 2008 industrial injury. After his neck injury, Claimant was re-trained to work as an

agricultural truck driver. He steadily performed that work for comparable or higher pay until relocating to Arizona. Claimant promptly became re-employed at an automobile dealership, where he continues to work. He earns substantially more than he ever did in the earlier agricultural positions. Mr. Prestwood's testimony does not compel a contrary conclusion. We have recognized that:

> [W]hile the employment expert may bring to the trier of fact his expertise in this area (which makes his *opinion* admissible) this type of evidence is not so completely outside the understanding of the average layman, that a contrary conclusion cannot be reached. As with most expert opinions, the trier of fact is entitled to consider it, but give it only the weight to which he deems it is entitled.

Le Duc v. Indus. Comm'n, 116 Ariz. 95, 98, 567 P.2d 1224, 1227 (App. 1977) (emphasis added). The ALJ considered Prestwood's testimony, but obviously accorded it little weight. This was within the ALJ's province.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge